United Nations AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/991
13 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 991

Case No. 1123: SHAMSI

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Brigitte Stern; Mr. Omer Yousif Bireedo;

Whereas at the request of Issa Suleiman Shamsi, a former staff member of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 2000 the time-limit for the filing of an application with the Tribunal;

Whereas, on 5 February 2000, the Applicant filed an Application requesting the Tribunal to:

"a. [Rescind] the decision of termination.

b. [Reinstate the Applicant] to duty, and [consider] the period of cessation special leave with full pay.

c. [Pay to the Applicant] suitable compensation for expenses."

Whereas the Respondent filed his Answer on 30 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 January 1985, as an Area staff member with a temporary indefinite appointment as Personnel Assistant in the Syrian Field Office, Damascus. Effective 1 September 1988, the Applicant was promoted to the post of Assistant Field Personnel Officer and on 1 March 1992, he was transferred to the post of Field Administrative Services Officer.

Following a Board of Inquiry (BOI) investigation and report on corruption and dishonesty of UNRWA employees in the South Area, on 12 July 1995, the Officer-in-Charge of UNRWA Affairs advised the Applicant that his appointment was being terminated in the interest of the Agency, pursuant to Area staff regulation 9.1 and Area staff rule 109.1. The Applicant successfully appealed this decision to the Joint Appeals Board (JAB), and on 18 March 1997, the Commissioner-General reversed his decision to terminate the Applicant's services in the interest of the Agency.

Accordingly, on 25 May 1997, the Applicant was advised by the Field Administration Officer (FAO) that, as his previous post had been filled and there was no vacant post at his grade (grade 13), UNRWA was offering him reinstatement to the grade 12 post of Administrative Officer, Field Supply and Transport Department, with grade and salary protection at grade 13. Confirmation of the new post would, however, be subject to the successful completion of one year of satisfactory service. The Applicant accepted the offer and was reinstated with effect from 10 June 1997.

The Applicant subsequently appealed his reinstatement to a lower grade post to this Administrative Tribunal. In Judgement No. 931, *Shamsi & Abboud* (1999), the Tribunal found that, as the Respondent had accepted the JAB's recommendation in favour of the Applicant and had reinstated him, the application did not meet the criteria for admissibility contained in article 7 of the Statute of the Tribunal

In February 1998, the Field Supply and Transport Officer (FSTO) completed the Applicant's performance evaluation report (PER), finding his performance unsatisfactory in a number of areas. The FSTO noted on the PER that he had requested another evaluation be completed at the end of April. The PER was discussed with the Applicant on 17 February 1998. On 19 March 1998, the Applicant wrote to the FAO, stating his disagreement with his evaluation and requesting a transfer to the post he had occupied prior to his termination in 1995. The FAO informed the Applicant that his request could not be honoured as the post was occupied by another staff member.

On 8 June 1998, in the Applicant's second PER, the FSTO noted "[t]here has been NO improvement in [the Applicant's] performance since the last report". The PER was discussed with the Applicant on 8 June. The following day, the Field Personnel Officer (FPO) notified the Applicant that his probation would be extended for three months. On 12 June 1998, the Applicant challenged his evaluation and requested confirmation in his post. In response, the FSTO and Deputy FSTO met with the Applicant on 14 July 1998 and offered him an opportunity to improve his computer skills.

On 9 September 1998, the FSTO completed a third PER in which the Applicant's performance was again evaluated as unsatisfactory. On 10 September 1998, the FPO informed the Applicant that the Agency had decided to defer the Applicant's annual increment and confirmation of his appointment, and to extend his probationary period for a further three months. He advised the Applicant that, in the absence of a satisfactory PER at the end of this period, the Agency would have no alternative but to downgrade the Applicant or terminate his appointment in the interest of the Agency. The Applicant replied on 22 October 1998, alleging that the negative PER was the result of bias against him.

On 2 December 1998, the Applicant wrote to the FAO advising him that he wished to "opt for early voluntary retirement" effective 4 January 1999. On 3 December 1998, the FSTO completed the Applicant's fourth and final PER, which again reflected unsatisfactory performance. On 6 December, the Officer-in-Charge of UNRWA Affairs informed the Applicant that his appointment was being terminated in the interest of the Agency pursuant to Area staff regulation 9.1 and Area staff rule 109.1 with effect from 9 December 1998. He advised the Applicant that his request for early voluntary retirement effective 4 January 1999 could not be approved, but that a request for early voluntary retirement effective 9 December 1998 could be approved. The Applicant replied the following day that he would take early voluntary retirement effective 9 December 1998 but that he wished to reserve his right to appeal to the JAB.

On 4 January 1999, the Applicant wrote to the Director of UNRWA Affairs requesting that the decision be reversed. The Director replied on 13 January 1999, advising him that she had carefully reviewed his case and that his PERs indicated he failed to meet the requirements of his post. Accordingly, she confirmed "the decision to terminate [the Applicant's] services in the interest of the Agency and the subsequent conversion to Early Voluntary Retirement at [his] own request".

On 12 February 1999, the Applicant lodged an appeal with the Area JAB. The JAB adopted its report on 28 June 1999. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

25. ...

(a) The Board noted that the three periodic reports filled during the Appellant's probationary period were filled by only one person [namely] his principal supervisor and not his immediate supervisor. Moreover, the Board noted that his first periodic report was discussed with the Appellant in the presence of his immediate supervisor who did not participate in the evaluation.

(b) The Board also noted that the Administration contradicted itself when at first it refused to give him early voluntary retirement and then only after three days it accepted his option of early voluntary retirement.

(c) In this context, the Board is of the opinion that the Administration has acted within the framework of standing rules and regulations and that there is no bias or prejudice against the Appellant.

IV. RECOMMENDATION

26. In view of the foregoing ... the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the appeal be dismissed."

On 18 July 1999, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him that he agreed with the JAB's conclusion that his appeal be dismissed.

On 5 February 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment in the interest of the Agency was both factually and legally flawed.

2. The Respondent deliberately kept documents from the JAB.

3. The Respondent erred in reinstating the Applicant on a probationary basis.

Whereas the Respondent's principal contentions are:

1. The application is non-receivable as, pursuant to Area staff rule 109.2, the administrative decision to terminate the Applicant's employment was withdrawn upon his acceptance of an early voluntary retirement option. Accordingly, there is no administrative decision to be appealed.

2. The Applicant separated from service by early voluntary retirement.

3. The Respondent did not err in refusing the Applicant's initial request for early voluntary retirement effective 4 January 1999.

4. The Respondent's decision to terminate the Applicant's appointment in the interest of the Agency was procedurally correct and not improperly motivated.

5. The Applicant bears the burden of proof in challenging a decision of the Respondent as procedurally defective or prompted by improper motive. The burden of proof in the instant case is heavier because the Applicant was terminated during his probationary period.

6. The Respondent did not err in reinstating the Applicant subject to satisfactory completion of a probationary period, nor did the Tribunal make such a finding in *Shamsi & Abboud*.

The Tribunal, having deliberated from 3 to 13 July 2001, now pronounces the following judgement:

I. The Tribunal considers that this application should be regarded as moot or otherwise so devoid of reality that it would not be appropriate to seek to determine the principal issue raised, i.e. whether the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency was valid and lawful. This situation arises because no action has been taken toward implementing that decision. On being informed of the decision, the Applicant chose to take early voluntary retirement effective 9 December 1998, which offer was accepted by the Respondent.

II. Prior to the decision of the Respondent on 6 December 1998 that the Applicant's appointment should be terminated in the interest of the Agency, the Applicant, in anticipation of yet another poor

performance evaluation and fearing that he was going to be dismissed (he says for reasons of prejudice and bias), had on 2 December 1998 applied for early voluntary retirement effective 4 January 1999.

The relevant Staff Regulations and Rules provide that a person taken on by the Agency on probation, should not be kept on probation for more than eighteen months. Personnel Directive A4/Part VII/Rev.7, paragraph 9.1 provides that "the total period of continuous probation shall not in any circumstances exceed eighteen months". Had the Applicant been allowed to stay on until 4 January 1999, that period of eighteen months would have been exceeded. In the circumstances (understandably as far as the Tribunal is concerned) the Agency declined to accept the Applicant's first offer to take early voluntary retirement effective 4 January 1999, as to have done so would have meant that it would have had to extend his employment beyond that period of eighteen months. This it was unwilling to do given its perception of the Applicant's performance. Instead it offered to accept an application for early voluntary retirement provided it came into effect within the eighteen-month period from the date on which he had been taken back into service.

III. The Applicant has claimed that his performance whilst re-employed by the Agency has been satisfactory and claims that the poor performance and evaluation reports stating otherwise were the result of bias and prejudice. This complaint has been rejected by the JAB. It was entitled to do so and the Tribunal sees no reason why it should alter that finding.

IV. The Tribunal is satisfied that the Applicant's appointment by the Agency ended because the Applicant had applied for early voluntary retirement and because that application had been accepted, and not because of the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency. The Tribunal rejects the Applicant's claim that his application for early retirement should not be considered as voluntary on the grounds that he had been coerced into proffering it by fabricated or falsified poor performance assessments and by unfounded criticisms and complaints relating to the performance of his work. Since the Applicant's appointment was terminated by his voluntary action rather than as the result of any wrongful act of the Respondent, there is no basis for the Applicant's claims and all relief sought is refused.

V. The facts that after the Applicant's retirement he requested review of the decision that he had been terminated in the interest of the Agency and sought that it be quashed or overturned, and that the Agency considered his request and rejected it, have no relevance to these proceedings. However, the Tribunal considers that had the Agency responded to that request by saying that it was moot this might have been more appropriate than by appearing to consider it and confirming the decision.

VI. As to the "additional documents" submitted by the Applicant late in the day and not seen by the JAB prior to concluding its deliberations and issuing its report, the Tribunal notes that the Applicant did not submit those documents to the Field Office for forwarding to the JAB until five days prior to the date on which he had been advised that the JAB hearing would be held. It took one week for the Field Office to forward the documents to the JAB. However, the Tribunal does not discern any sinister motive in that one week delay, but rather considers that the Field Office forwarded the documents in the ordinary course of business. Further, the Tribunal has considered the documents and is satisfied that even if they had been submitted with dispatch and transmitted in time, there is nothing contained therein which would have altered the findings of the JAB. In those circumstances, the Tribunal does not consider that the Field Office could have had any sinister motive by deliberately keeping the papers from the JAB as the Tribunal considers that nothing contained therein was either embarrassing to the Agency or would have harmed its case.

VII. As to the Applicant's claim that the Respondent had no power to take the Applicant back "on probation" (i.e. he was taken back subject to successful completion of one year of satisfactory service, and this probation was twice extended for periods of three months) the Tribunal is satisfied that this claim must fail. When the Respondent agreed on 18 March 1997, to accept the JAB recommendation of reinstatement, he had no obligation to act on that recommendation and when he chose to do so, it was on such terms as he saw fit. Furthermore, those terms proved acceptable to the Applicant, who accepted them and returned to the service of the Agency on the terms offered, which included a probationary period.

VIII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Brigitte STERN
Member

Omer Yousif BIREEDO
Member

Geneva, 13 July 2001

Maritza STRUYVENBERG
Executive Secretary